FOR ARGUMENT

(13)

Supreme Court, U.S.
FILED
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No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

JOINT APPENDIX

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Petition for Writ of Certiorari Filed November 22, 2000
Certiorari Granted November 24, 2000

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The following judgments, memoranda, orders and statutes have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the printed *Petition for a Writ of Certiorari*:

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SUPREME COURT OF FLORIDA

Case No. SC00-2346

Palm Beach County Canvassing Board, et al.

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/15/00	PETITION-PROHIBITION Filed By: PT Palm Beach County Canvassing Board By: PT Bruce Rogow 0067999
11/15/00	MOTION-INTERVENE Filed By: MR Hon. George W. Bush By: ME Barry Richard 0105599 Order: Order-Response/Reply Requested Notes: Of George W. Bush (O&9)
11/15/00	MOTION-INTERVENE Filed By: MP Broward County Canvassing Board By: MP Edward A. Dion 267732 Order: Order-Response/Reply Requested Notes: By Broward County Canvassing Board's & The Broward County Supervisor of Elections' Motion to Intervene and/or To Join in Emergency Proceedings; Alternatively, Motion To Consolidate, with Diskette
11/15/00	MOTION-INTERVENE Filed By: MP Hon. Albert A. Gore, Jr. By: MP W. Dexter Douglass 0020263 Order: Order-Response/Reply Requested

Date	Description
	Notes: Of Albert A. Gore and the Florida Democratic Executive Committee, with Diskette
11/16/00	RESPONSE Filed By: MR Hon. George W. Bush By: ME Barry Richard 0105599 Notes: Of the Intervenor George W. Bush to Petitioner's Emergency Petition for Extraordinary Writ (O&9, with Diskette)
11/16/00	RESPONSE Filed By: RS Hon. Katherine Harris By: Deborah K. Kearney 0334820 Notes: Of Katherine Harris, as Secretary of State, to the Emergency Petition for Extraordinary Writ Filed by the Palm Beach County Canvassing Board (O&7, with Diskette); 11/16/00 Filed Amended Response (O&9, with Diskette)
11/17/00	ORDER-OTHER SUBSTANTIVE Notes: Stay Order – Enjoining Respondent From Certifying the Results of the 11/07/2000 Presidential Election Until Further Order of this Court; It Is Not the Intent of This Order To Stop the Counting and Conveying to the Secretary of State the Results of Absentee Ballots or Any Other Ballots – To "View" Order See SC00-2348
11/21/00	DISP-DISMISSED MISC. Manner: Order by Judge
11/21/00	MANDATE Notes: As to SC00-2348 & SC00-2349 (cc: Couns/DCA-1)

SUPREME COURT OF FLORIDA

Case No. SC00-2348

Volusia County Canvassing Board, et al.

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/17/00	CERTFD JUDGMENT FROM TRIAL COURT
11/17/00	ORDER-OTHER SUBSTANTIVE Notes: Stay Order – Enjoining Respondent from Certifying the Results of the 11/07/00 Presidential Election Until Further Order of this Court; It Is Not the Intent of This Order To Stop the Counting and Conveying to the Secretary of State the Results of Absentee Ballots or Any Other Ballots
11/17/00	ORDER-ORAL ARGUMENT CALENDAR/BRF SCHED Notes: Cases Consolidated for All Appellate Purposes (SC00-2346, SC00-2348, SC00-2349); Initial Brief Due by 2:00 PM 11/18/00, Answer Brief Due by 12:00 Noon 11/19/00; Reply Brief Due by 3:00 P.M. 11/19/00 & ROA Due by 12:00 Noon 11/18/00 (To "View" Order See SC00-2346)

Date	Description
11/18/00	INITIAL BRIEF-MERITS Notes: Al Gore, Jr. & Florida Democratic Party (O&7 w/Disk)
11/18/00	ORDER-OTHER SUBSTANTIVE Notes: Volusia County Canvassing Board's Notice of Voluntary Dismissal Is Approved & Volusia County Canvassing Board Is Hereby Dismissed as a Party in the Above Case
11/18/00	INITIAL BRIEF-MERITS Notes: Broward County Canvassing Board/ Broward County Supervisor of Elections (O&7 w/Disk)
11/19/00	ANSWER BRIEF-MERITS Filed By: AE Hon. George W. Bush By: AE Barry Richard 0105599 Notes: O&7 w/Disk
11/21/00	DISP-REVERSED Manner: Per Curiam Release To West: 11/21/00 Pages: 43 Notes: Trial Court's Orders; No Mot/Rehearing Allowed.
11/21/00	MANDATE Notes: cc: Couns/DCA-1

SUPREME COURT OF FLORIDA

Case No. SC00-2349

Florida Democratic Party

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/17/00	CERTFD JUDGMENT FROM TRIAL COURT Filed By: AA Florida Democratic Party By: AA Karen A. Gievers 0262005 Notes: With Order from DCA Certifying Case to This Court and Order from Circuit Court Denying Emerg. Mot. To Compel Compliance with and for Enforcement Of Injunction
11/17/00	ORDER-ORAL ARGUMENT CALENDAR/BRF SCHED Notes: Cases Consolidated for All Appellate Purposes (SC00-2346, SC00-2348, SC00-2349); Initial Brief Due by 2:00 PM 11/18/00, Answer Brief Due by 12:00 Noon 11/19/00, Reply Brief Due by 3:00 P.M. 11/19/00 & ROA Due by 12:00 Noon 11/18/00 (To "View" Order See SC00-2346)

Date	Description
11/21/00	DISP-REVERSED Manner: Per Curiam Release to West: 11/21/2000 Pages: 43 Notes: Trial Court's Orders; No Mot/Rehearing Allowed. . . .
11/21/00	MANDATE Notes: cc: Couns/DCA-1

CIRCUIT CIVIL COURT
FOR COUNTY OF LEON

Case No. CV00-02700

Michael McDermott, et al.

v.

Katherine Harris, et al.

DOCKET ENTRIES

Date	Description
11/13/00	Complaint
11/13/00	Plaintiff Motion for Temporary Restraining Order and Preliminary Injunction
11/13/00	Plaintiff's Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction
11/13/00	Motion To Intervene of George W. Bush
11/13/00	Notice of Appearance by Harold McLean
11/13/00	Notice of Appearance by Bill Bryant for Bob Crawford
11/13/00	Motion of Al Gore To Intervene
11/14/00	Notice of Supplemental Authority
11/14/00	Defendants' Notice of Supplemental Authority
11/14/00	Order Granting in Part Denying in Part Motion for Temporary Injunction F&E
11/14/00	Matt Butler's Supplemental Memorandum of Law in Support of Motion To Dismiss and/or To Deny Preliminary Injunction

Date	Description
11/14/00	Defendants' Memorandum in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction
11/14/00	Defendants' Notice of Supplemental Authority
11/14/00	Motion To Intervene of the State Executive Committee of the Florida Democratic Party
11/14/00	Matt Butler's Petition To Intervene and Motion To Dismiss Complaint, or in the Alternative, To Deny Plaintiffs' Motion for Temporary Injunction
11/14/00	True Copy of DE 00-10 Deadline for Certification on County Results/Katherine Harris, Secretary of State
11/14/00	Court Exhibits 1, 2, 3 and 4
11/14/00	Appeal to District Court
11/15/00	Canvassing Board for Palm Beach County Florida Notice of Joinder of Appeal
11/15/00	Canvassing Board for Palm Beach County Fla Notice of Joinder of Appeal Original (Fax Copy Was Recorded)
11/16/00	Emergency Motion of Democratic Party of Fla and Vice President Al Gore To Compel Compliance with and for Enforcement of Injunction (with Exhibits)
11/16/00	DCA No:1D00-4467
11/16/00	Motion To Intervene Canvassing Board of Broward County
11/16/00	Notice of Supplemental Filing
11/16/00	Notice of Filing Supplemental Authority

Date	Description
11/16/00	Memorandum in Opposition to Movants Emergency Motion of Democratic Party of Fla and Vice President Al Gore To Compel Compliance with and for Enforcement of Injunction
11/16/00	Notice of Filing Order Dissolving Injunction, Requiring Certification of Returns, Permitting Manual Recount of Returns upon the Discretion of the Palm Beach County Elections Canvassing Commission, and Directions to the Secretary of State
11/16/00	Motion of Democratic Party of Florida and Vice President Albert Gore To Supplement the Record
11/16/00	Notice of Second Supplemental Filing
11/16/00	Defendant Katherine Harris' Memorandum of Law
11/17/00	Order Denying Emergency Motion To Compel Compliance with and for Enforcement of Injunction
11/17/00	Appeal to District Court
11/17/00	Intervenors' Appeal to District Court F&E
11/17/00	Certified Copy of Notice of Appeal Sent to DCA
11/17/00	Certified Copy of Notice of Appeal Sent to DCA
11/18/00	Appeal Record Prepared
11/18/00	Index
11/18/00	Record Delivered to SC
11/20/00	Supreme Court Order

Date	Description
11/20/00	Order Accepting Jurisdiction Setting Oral Argument and Setting Briefing Schedule
11/20/00	Stay Order
11/20/00	Notice of Substitution of Counsel
11/20/00	Appendix to Initial Brief of Albert Gore, Jr. and the Florida Democratic Executive Committee (Copy of Filing with the Supreme Court)
11/20/00	Joint Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy of Filing with Supreme Court)
11/20/00	Canvassing Board for Palm Beach County, Florida Notice of Joinder of Appeal
11/20/00	Canvassing Board for Palm Beach County, Florida Notice of Joinder of Appeal
11/20/00	Motion To Allow Demonstrative Exhibit of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy of Document Filed with Supreme Court)
11/21/00	Proceedings (Copy)
11/21/00	Appendix Joint Reply Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy)
11/21/00	Response to Motion To Modify Oral Argument Time Apportionment (Copy)
11/21/00	Reply Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy)
11/21/00	DCA Order, The Above Cases Are Consolidated

Date	Description
11/21/00	DCA Order, On the Court's Own Motion, It Is Hereby Certified in Accordance with Florida Rule of Appellate Procedure 9.125 That This Appeal Requires Immediate Resolution by the Supreme Court of Florida Because the Orders on Appeal Present Issues Which Are of Great Public Importance
11/21/00	DCA No:1D00-4501
11/21/00	DCA No:1D00-4506
11/22/00	Supreme Court Ruling
11/22/00	Acknowledgment of New Case (Copy)

METROPOLITAN DADE COUNTY, FLORIDA
Office of the Supervisor of Elections

November 15, 2000

Honorable Katherine Harris
Secretary of State
8802, The Capitol
400 South Monroe Street
Tallahassee, FL 32399-0250

Dear Secretary Harris:

After a careful review of the written filings, exhibits and presentation of oral argument of the requesting party, the Democratic party, as well as the Republican party's response and all other interested persons, the Miami-Dade Canvassing Board exercised its discretion and unanimously voted to conduct a manual recount of three precincts selected by the requesting party comprising 1% of the vote as provided for pursuant to Florida Statute 102.166.

The Miami-Dade County Canvassing Board urges you to accept the Supplemental Certificate of Results for the Office of President of the United States. These supplemental votes are a result of the Canvassing Board's decision to hand count three precincts. The manual recount of the three precincts was completed at approximately 8:00 p.m. on November 14, 2000. The Supplemental Certificate of Results will be faxed to the Division of Elections prior to 2:00 p.m. on Wednesday, November 15, 2000 and an original certification will be sent to the Division of Elections such that it will be received by that office on November 16, 2000.

The Miami-Dade County Canvassing Board believes it is imperative that the votes for the Office of President of the United States contained in the Supplemental Certificate of Results be added to the vote totals of the Board's Certificate of Results dated November 9, 2000.

Please contact David C. Leahy, Supervisor of Elections for Miami-Dade County, at 305-375-3150 if you have any questions regarding this request or the Supplemental Certificate of Results.

Sincerely,

MIAMI-DADE CANVASSING BOARD

/s/
County Court Judge LAWRENCE D. KING
Chairperson

/s/
County Court Judge MYRIAM LEHR
Substitute Member

/s/
Supervisor of Elections DAVID C. LEAHY
Member

cc: L. Clayton Roberts, Director
Division of Elections

JENNIFER EDWARDS
SUPERVISOR OF ELECTIONS

Collier Government Complex
3301 Tamiami Trail East, Building B
Naples, Florida 34112-4902
Telephone: 941/774-6450
Fax: 941/774-9468
www.co.collier.fl.us

November 15, 2000 VIA FAX & FED EX

The Honorable Katherine Harris
Secretary of State
Florida Department of State
Division of Elections
The Capital, Room 1801
Tallahassee, Florida 32399

Honorable Katherine Harris,

On November 14, 2000, as Collier County Supervisor of Elections Employees were preparing the ballot envelopes of this November 7, 2000 General Election for storage, we performed a post election audit of all envelopes to confirm all envelopes were empty. During this audit, we found 24 ballots had not been removed from the envelope in which they were received, although accepted and opened prior to the election, but were not counted. These 24 ballots represent a cross section of voters of several political parties upon review of the unopened ballot envelopes.

An additional ballot was received October 18, 2000 and accepted. Upon opening, it was ascertained to be a ballot card for the first primary election. Upon further investigation of this ballot, it was determined that the voter had voted for the general election using a first primary ballot card.

We provide this for your information; we are <u>not</u> requesting a manual recount of ballots for this recent General Election. We do inquire if the Canvassing Board of Collier County Florida may provide an amended recount certification of Colliers ballots by merely adding these inadvertently omitted absentee ballots to the total ballot counts already certified and provided.

If this amended recount is approved, the count of these 25 ballots will take place on Friday, November 17, 2000 at 2 p.m. in the Elections Office, M.L. King Building, 3301 Tamiami Trail, Naples, Florida 34104. This will occur at the same meeting at which our overseas ballots will be canvassed, however, they will be certified separately.

Sincerely,

/s/
Jennifer J. Edwards
Supervisor of Elections
Collier County

CANVASSING BOARD
BROWARD COUNTY, FLORIDA
201 S.E. 6th Street
Room 6760
Ft. Lauderdale, FL 33301

November 15, 2000

The Honorable Katherine Harris
State of Florida
Secretary of State
The Capitol
Room 1801
Tallahassee, FL 32399-0250
Via facsimile – (850) 488-1768

RE: Request of Broward County Canvassing Board to Amend Certification of County Returns After November 14, 2000

Dear Secretary Harris:

This letter is in response to your November 14, 2000 memorandum in which you required the Broward County Canvassing Board (the "Board") to submit a written statement of facts and circumstances justifying an amended certification of county returns. The Board has concluded that the limited manual recount to date indicates an error in the vote tabulation which could affect the outcome of the election, requiring all manual recount of the ballots.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.

2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded

more time than boards representing voters in less-populated counties.

3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.

4. The Board has encountered significant periods of delay, including:

A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Based on these facts and circumstances, the Board voted today to begin a full manual recount. The Board expects to complete the recount by 5:00 p.m. on Monday, November 20, 2000. In accordance with your memorandum, the Board will advise you in the future of any change in relevant facts and circumstances regarding this recount, including the estimated completion time.

Please feel free to contact me with any question or concerns.

Respectfully submitted,

/s/
Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Board

November 15, 2000

The Honorable Katherine Harris
Secretary of State
The Capitol
Tallahassee, FL 32399-0250

RE: Amended certification of returns

Dear Secretary Harris:

This letter is in response to your request for a written statement of the facts and circumstances which would necessitate a change to be made in the final certification of the statewide vote based on the results of Palm Beach County's manual recount of all the ballots cast in Palm Beach County for the offices of President and Vice President.

The Palm Beach County Canvassing Board has conducted a machine recount of the ballots and a limited manual recount of one percent of the total votes cast in accordance with Section 102.166(4)(d), Florida Statutes. The limited manual recount produced different results than the machine recount. The machine recorded approximately 10,000 undervotes. As stated in the Canvassing Board's Petition for Extraordinary Writ, it elected to conduct a manual recount "[b]ecause the results could affect the outcome of the election." See, § 102.166(5), Fla. Stat.

On Sunday, November 12, 2000, the Canvassing Board voted to conduct a manual recount of all the ballots cast in Palm Beach County for the offices of President and Vice-President pursuant to the authority granted to it under Section 102.166(5)(c), Florida Statutes. As you are aware, the Canvassing Board also voted to seek advisory opinions from the Division of Elections and the Attorney General regarding the proper interpretation of Section 102.166(5), Florida Statutes. The opinions were conflicting: accordingly, the Canvassing Board is currently seeking to an adjudication by

the Florida Supreme Court to resolve the conflicting opinions on the question of whether the Canvassing Board may, under the above-referenced circumstances, conduct a manual recount of the votes cast for President and Vice President. The Canvassing Board has voted to suspend its manual recount pending the resolution of this issue and other issues by the Florida Supreme Court.

A manual recount of four precincts, which accounts for approximately one percent of the total votes cast in Palm Beach County, resulted in a difference in the vote totals. The 4695 ballots manually recounted in four precincts resulted in a total gain of 33 votes for Vice President Al Gore and 14 votes for Governor George W. Bush, which is a net gain of 19 votes for Vice President Al Gore. Clearly, the results of the manual recount could affect the outcome of this very close presidential election if the manual recounts in the other precincts also vary in this degree from the machine counts.

Sincerely,

/s/
The Honorable Charles Burton,
County Court Judge, 15th Judicial Circuit
Chairperson, Palm Beach County Canvassing Board

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Charles Burton
County Court Judge
Chair, Palm Beach County Canvassing Commission
Palm Beach County Courthouse
West Palm Beach, Florida 33401

RE: Request of Palm Beach County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Burton:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Palm Beach County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I also am in receipt of your report filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to

evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et. al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the

voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (F1a. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a machine recount and a limited manual recount of one percent of the total votes cast and that the two recounts produced "different results than the machine recount." The Board has alleged that "the machine recorded approximately 10,000 undervotes." And, the Board alleged that it has received conflicting opinions from the Division of Elections and the Attorney General regarding the proper interpretation of § 102.166(5), Florida Statutes, and that the Board is seeking adjudication by the Florida Supreme Court to resolve the conflicting opinions on whether the Board may conduct a manual recount under the law. Finally, the Board alleged that the results of a manual recount could affect the outcome of the election. In its report filed with the Division of Elections, the Board responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the

Board also noted that it would provide additional details regarding "difficulties or unusual circumstances encountered by an election board or canvassing board," and "problems which the canvassing board feels should be made a part of the official election record."

Application or Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the possibility that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the possibility of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to § 102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Lawrence D. King
Chair, Miami-Dade Canvassing Board
Office of the Supervisor of Elections
Suite 1910
111 NW 1st Street
Miami, Florida 33128-1962

RE: Request of Miami-Dade Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman King:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Miami Dade Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I am not in receipt of your report due to be filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion.

There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expec-

tation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a limited manual recount of one percent of the total votes cast with respect to the Office of the President of the United States, completed at approximately 8:00 p.m. on November 14, 2000. The Board also has alleged that it has voted to conduct a manual recount of six precincts with respect to votes cast in the race for Congressional District 22, and that this recount was scheduled to begin this morning. The Board has alleged no facts or circumstances in support of the manual recounts.

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with rea-

sonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Miami-Dade County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Commission
201 S.E. 6th Street, Room 6760
Ft. Lauderdale, FL 33301

RE: Request of Broward County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Lee:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Broward County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts set forth in your report filed November 13, 2000, and your letter of today's date and assumed that they are true.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.

2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded more time than boards representing voters in less-populated counties.

3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.

4. The Board has encountered significant periods of delay, including:

A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Additionally, the Board, in its report filed with the Division of Elections on November 13, 2000, responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the Board stated that "2 precincts failed to have ballots in transfer case; ballots retrieved from locked boxes left at precinct." And, the Board responded in the negative to the question of whether the board knew of "any other problems which

the canvassing board feels should be made a part of the official election record."

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures. The Board has not alleged any facts or circumstances that suggest that Broward County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged large voter turnout and logistical problems associated with that turnout. However, Broward County is a large county and high voter turnout was not unexpected. The Board also has alleged delay in the certification process associated with litigation, a family holiday by the Supervisor of Elections, and the Veterans' Day holiday. However, I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Jennifer Edwards
Supervisor of Elections
Collier County Canvassing Commission
Collier County Government
3301 Tamiami Trail East, Building B
Naples, Florida 34112-4902

RE: Request of Collier County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Supervisor Edwards:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Collier County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I also am in receipt of your report filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion.

There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (F1a. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board asks whether it may provide an amended recount certification of Collier's ballots by adding 25 inadvertently omitted ballots to the total ballot counts already certified and provided. In its report filed with the Division of Elections, the Board reported that addressed several complaints of equipment malfunction. In all cases the complaints were investigated, and the malfunctions were either corrected or the machines were determined to be functioning correctly. The Board reported that there were no difficulties or unusual circumstances encountered by the elections board or the canvassing board. They Board also reported that a number of individuals reported to vote under the impression that they had registered to vote at the Department of Motor Vehicles, but that these voters' applications were not on file with the supervisor of election.

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Collier County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. Rather, the Board has alleged that 25 ballots were mistakenly not counted. I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to § 102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

M E M O R A N D U M

TO: Supervisors of Elections
Broward, Miami-Dade and
Palm Beach County

FROM: Clay Roberts, Director
Division of Elections

DATE: November 14, 2000

SUBJECT: Amended certification of returns

As of 5 p.m. today, the Division of Elections has received certification of returns from all 67 Florida counties. The usual practice of the state elections canvassing commission is to finally certify these returns as soon as the compilations are completed by the staff of the division. However, we understand your county may plan to conduct a manual recount continuing beyond today's 5 p.m. deadline.

Leon County Circuit Court Judge Terry Lewis confirmed today that the Secretary of State has the discretion to consider any request to amend certification of county returns after the deadline. In order to properly exercise that discretion, the Secretary requires that you forward to her by 2 p.m. Wednesday, November 15, 2000 a written statement of the facts and circumstances that cause you to believe that a change should be made to what otherwise would be the final certification of the statewide vote, composed of the tallies received by 5 p.m. today, plus the total of the votes received from overseas ballots received by the counties by midnight on Friday.

As always, please call us if you have any questions.

STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL

ROBERT A. BUTTERWORTH

November 14, 2000

The Honorable Charles E. Burton 00-65
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

Dear Judge Burton:

On behalf of the Palm Beach County Canvassing Board, you have asked this office's opinion as to the meaning of "error in voting tabulation which could affect the outcome of" an election as that phrase is used in section 102.166(5), Florida Statutes.

I am answering your request fully mindful that just yesterday the Division of Elections rendered Division of Elections Opinion 00-11 to the Chairman of the Republican Party, interpreting the duties of a county canvassing board pursuant to section 102.166(5), Florida Statutes.[1] Because the Division of Elections opinion is so clearly at variance with the existing Florida statutes and

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[1] The validity of the opinion of the Division of Elections is questionable since it appears to exceed the authority granted to the division by Florida law. Section 106.23(2), Florida Statutes, provides the division with the authority to render advisory opinions interpreting the election code to, among others, a political party relating to actions such party has taken or proposes to take. Division of Elections Opinion 00-11, however, erroneously seeks to advise a political party about the responsibilities of the supervisor of elections and local canvassing board under section 102.166(5).

case law, and because of the immediate impact this erroneous opinion could have on the on-going recount process, I am issuing this advisory opinion.

Section 102.166(4), Florida Statutes, permits a local canvassing board, upon request of a candidate or political party, to authorize a manual recount to include at least three precincts and at least 1 percent of the total votes cast for such candidate.[2] Section 102.166(5), Florida Statutes, provides "[i]f the manual recount indicates an error in vote tabulation which could affect the outcome of the election, the county canvassing board shall" among other options, manually recount all ballots.

Division of Election Opinion 00-11 concludes that the language "error in the vote tabulation" in section 102.166(5), Florida Statutes, refers only to a counting error in the vote tabulation system. The opinion concludes that the inability of a voting system to read an "improperly marked marksense or improperly punched punchcard ballot" is not an "error in the voter tabulation system" and would not, therefore, trigger a recount of all ballots.

The division's opinion is wrong in several respects.

The opinion ignores the plain language of the statute which refers not to an error in the vote tabulation system but to an error in the vote tabulation. The Legislature has used the terms "vote tabulation system" and "automatic tabulating equipment" elsewhere in section 102.166, Florida Statutes, when it intended to refer to the system rather than the vote count. Yet the division, by reading "vote tabulation" and "vote tabulation sys-

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[2] *See*, s. 102.166(4)(d), Fla. Stat., stating that the person requesting the recount "shall choose three precincts to be recounted."

tem" as synonymous, blurs the distinctions that the Legislature clearly delineated in section 102.166.[3]

The error in vote tabulation might be caused by a mechanical malfunction in the operation of the vote-counting system, but the error might also result from the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots. The fact that both possibilities are contemplated is evidenced by section 102.166(7) and (8), Florida Statutes. While subsection (8) addresses verification of tabulation software, subsection (7) provides procedures for an examination of the ballot by the canvassing board and counting teams to determine the voter's intent.

The division's opinion, without authority or support, effectively nullifies the language of section 102.166(7), Florida Statutes. Nothing in subsection (7) limits its application to the recount of all ballots. Rather, the procedures for a manual recount in subsection (7) equally apply to the initial sampling manual recount authorized in section 102.166(4)(d). Section 102.166(7)(b) states:

> If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

Yet under the division's interpretation, such language is rendered superfluous. It is fundamental principle of statutory construction that statutory language is not to be assumed to be surplusage; rather a statute is to

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[3] *See, e.g., Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984) (legislative use of different terms in different portions of same statute is strong evidence that different meanings were intended).

be construed to give meaning to all words and phrases contained within statute.[4]

Section 102.166(7) clearly recognizes that an examination by a person of the ballot will occur to determine whether the voter complied with the statutory requirement, *i.e.*, marked the marksense or punched the punchcard ballot. The statutes do not specify how a punchcard must be punched. Clearly, there may be instances where a punchcard or marksense ballot was not punched or marked in a manner in which the electronic or electro-mechanical equipment was able to read the ballot. Such a deficiency in the equipment in no way compromises the voter's intent or the canvassing board's ability to review the ballot and determine the voter's intent. In fact, section 101.5614(5) and (6), Florida Statutes, contemplate that such an examination will occur. Section 101.5614(6) provides that the ballot will not be counted if it is impossible to determine the elector's choice or the elector marks more than one name than there are persons to be elected.

Clearly, the manual count of the sampling precincts which reveals a discrepancy between votes counted by the automatic tabulating equipment and valid ballots which were not properly read by the equipment but which constitute ballots in which the voter complied with the statutory requirements and in which the voter's intent may be ascertained, constitutes an "error in vote tabulation." If the error is sufficient that it could affect

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[4] *See, Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982); *Pinellas County v. Woolley*, 189 So. 2d 217 (Fla. 2d DCA 1966); Ops. Att'y Gen. Fla. 95-27 (1995); 91-16 (1991) (operative language in a statute may not be regarded as surplusage); 91-11 (statute must be construed so as to give meaning to all words and phrases contained within that statute).

the outcome of the election, then a manual recount of all ballots may be ordered by the county canvassing board.

The division's opinion fails to acknowledge the longstanding case law in Florida which has held that the intent of the voters as shown by their ballots should be given effect. Where a ballot is marked so as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated.[5]

As the state has moved toward electronic voting, nothing in this evolution has diminished the standards first articulated in such decisions as *State ex rel. Smith v. Anderson*[6] and *State ex rel. Nuccio v. Williams*[7] that the intent of the voter is of paramount concern and should be given effect if the voter has complied with the statutory requirement and that intent may be determined. For example, if a voter has clearly, physically penetrated a punchcard ballot, the canvassing board has the authority to determine that the voter's intention is clearly expressed even though such puncture is not sufficient to be read by automatic tabulating equipment.

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5 *See, State ex rel. Smith v. Anderson*, 8 So. 1 (Fla. 1890); *Darby v State*, 75 So. 411 (Fla. 1917); *State ex rel. Nuccio v. Williams*, 120 So. 310 (F1a. 1929) (in performing their duty of counting, tabulating, and making due return of ballots cast in an election, the inspectors may, in some cases of ambiguity or apparent uncertainty in the name voted for, determine, from the fact of the ballot as cast, the person for whom a vote was intended by the voter).

6 8 So. 1 (Fla. 1890).

7 120 So. 310 (Fla. 1929).

In *State ex rel. Carpenter v. Barber*,[8] the Court stated:

> The intention of the voter should be ascertained from a study of the ballot and the vote counted, if the will and intention of the voter can be determined, even though the cross mark 'X' appears before or after the name of said candidate. *See Wiggins, Co. Judge, v. State ex rel. Drane*, 106 Fla. 793, 144 So. 62; *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310; *State ex rel. Knott v. Haskell*, 72 Fla. 176, 72 So. 651.

The Florida Statutes contemplate that where electronic or electromechanical voting systems are used, no vote is to be declared invalid or void if there is a clear indication of the intent of the voter as determined by the county canvassing board.[9]

In light of the plain language of section 102.166(5), Florida Statutes, authorizing a manual recount of all ballots when the sampling manual recount indicates an error in vote tabulation which could affect the outcome of the election and the general principles of election law, I must express my disagreement with the conclusions reached in Division of Election Opinion 00-11. Rather I am of the opinion that the term "error in voter tabulation" encompasses a discrepancy between the number of votes determined by a voter tabulation system and the

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8 198 So. 49, 51 (Fla. 1940).

9 *See, Wiggins v. State ex rel. Drane*, 144 So. 62, 63 (Fla. 1932) (separate tabulation and return of what may be deemed regular ballots does not mean that only regular ballots are to be counted; if the marking of the ballot should be irregular, but the voter casting such ballot has clearly indicated by an X-mark the candidate of his choice, the ballot should be counted as intended).

number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes.

Sincerely,

/s/
Robert A. Butterworth
Attorney General

COUNTY COURT
PALM BEACH COUNTY FLORIDA

Chambers of
Charles E. Burton
County Court Judge

County Courthouse
West Palm Beach, Florida 33401
Phone

November 13, 2000

Clay Roberts, Director
Division of Elections
1801 The Capitol
Tallahassee, Florida 32399

RE: Request for Advisory Opinion

Dear Mr. Roberts:

I have been authorized by the Palm Beach County Canvassing Board to request an opinion from your office on the following issues:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system/software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

A memorandum of law follows.

MEMORANDUM OF LAW

Question 1.

Section 102.166(5) provides:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

See also, Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (stating "the statutes clearly leave the decision to conduct a manual recount within the discretion of the board.")

The Palm Beach County Canvassing Board has voted to conduct a manual recount of the votes for the presidential election based on Section 102.166(5), Florida Statutes.

Question 2.

Section 102.151, Florida Statutes does not indicate whether a county canvassing board may certify the votes for less than all of the elections held on the November 7, 2000. The Palm Beach County Canvassing Board would like to exclude the votes for the presidential election based on an ongoing manual recount of the ballots for that election.

Respectfully submitted,

/s/
Judge Charles Burton
Chairperson, Palm Beach County Canvassing Board

cc: Denise Dytrych, Palm Beach County Attorney

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

November 13, 2000

The Honorable Charles E. Burton
Chairperson
Palm Beach County Canvassing Board
West Palm Beach, Florida

DE 00-10
Deadline for Certification
on County Results
§§ 102.111 and 102.112,
Fla. Stat.

Dear Judge Burton:

This is in response to your request for an opinion relating to sections 102.111 and 102.112, Florida Statutes. You are chairperson of the Palm Beach County Canvassing Boards and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you.

You state that the Palm Beach County Canvassing Board voted to have a manual recount of all ballots cast in the presidential election. Further, you state that the manual recount will not be completed by 5:00 p.m. of the seventh day following the election as provided in sections 102.11 and 102.112 Florida Statutes. Essentially you ask:

1. What effect will the provisions of section 102.111, Florida Statutes, when read in conjunction with section 102.112, Florida Statutes, have on the votes cast in the presidential election by the citizens of Palm Beach County?

2. May the board certify all other election results to the Department of State while the manual recount continues for the Presidential election?

In response to your first question, if the Palm Beach County Canvassing Board fails to certify the county returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election, the votes cast in Palm Beach County will not be counted in the certification of the statewide results.

Section 102.111, Florida Statutes, is explicitly mandatory. It provides, "[i]f the county returns are not received by the Department of State by 5 p.m. on the 7th day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified."

Section 102.112, Florida Statutes, provides in pertinent part that returns must be filed by 5 p.m. on the 7th day following the first primary and general election. Further, if the returns are not received by the department by the time specified, such returns may be ignored and the results on file at the time may be certified by the department. This section contemplates unforeseen circumstances not specifically contemplated by the legislature. Such unforeseen circumstances might include a natural disaster such Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections in that the law provides for automatic recounts, protests, and manual recounts. It also plainly states when this process must end.

Therefore, absent such unforeseen circumstances, returns from the county must be received by the Elections Canvassing Commission by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

The answer to your second question is yes, the county canvassing board may certify other election results to the Department of State while the manual recount continues for the presidential election.

SUMMARY

Absent such unforeseen circumstances such as a natural disaster, returns from the county must be received by the Elections Canvassing Commission by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results. The county canvassing board may certify other election results to the Department of State while the manual recount continues for the presidential election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

November 13, 2000

Mr. Al Cardenas
Chairman
Republican Party of Florida
Post Office Box 311
Tallahassee, Florida 32302

DE 00-11
Definition of Error in
Vote Tabulation
§ 102.166(5), Fla. Stat.

Dear Mr. Cardenas:

This is in response to your request for an opinion relating to section 102.166(5), Florida Statutes. You are the Chairman for the Republican Party of Florida and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

1. What is the meaning of the term "error in the vote tabulation" as used in section 102.166(5), Florida Statutes?
2. What is the meaning of "affecting the outcome of the election" as used in section 102.166(5), Florida Statutes?
3. What manner of "error" and what type and/or degree of effect on the outcome would serve as a lawful predicate for a manual recount of all ballots under section 102.166(5)(c), Florida Statutes?

Your questions involve the interpretation of election laws and can be answered with an advisory opinion. Section 102.166(5), Florida Statutes, provides in pertinent part that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting systems to read an improperly marked marksense or improperly punched punchcard ballot is not a "error in the vote tabulation" and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102.155(5)(a) through (c), Florida Statutes.

An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

SUMMARY

An "error in the vote tabulation," means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

DE 00-12
Manual Recount Procedures

November 13, 2000

§ 102.166, Fla. Stat.

TO: The Honorable Jane Carroll
Broward County Supervisor of Elections
Post Office Box 029001
Ft. Lauderdale, Florida 33302-9001

Dear Ms. Carroll:

This is in response to your request for an advisory opinion concerning manual recount procedures. You are the Supervisor of Elections for Broward County and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

> If a county canvassing board authorizes a manual recount of ballots of the presidential election pursuant to section 102.166(4)(c), Florida Statutes, and determines that the number of votes for one or more candidates changes and such changes are due to voter errors (such as failing to properly follow voting procedures), is the board authorized to conduct a manual recount of all ballots of the remainder of the county?

The answer to your question is no. Section 102.166(5), Florida Statutes, provides that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punch-

card ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Voter error is not an "error in the vote tabulation." Therefore, the county canvassing board is not authorized to conduct a manual recount of the remainder of the county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

SUMMARY

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punch-card ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Voter error is not an "error in the vote tabulation." Therefore, the county canvassing board is not authorized to conduct a manual recount of the remainder of the county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
DIVISION OF ELECTIONS

November 13, 2000

The Honorable Charles E. Burton
Chairperson
Palm Beach County Canvassing Board
Palm Beach County Courthouse
West Palm Beach, Florida 33401

DE 00-13
Manual Recount Procedures and
Partial Certification of County Returns
§§ 102.166(5) and 102.151, Fla. Stat.

Dear Judge Burton:

This is in response to your request for an opinion. You are chairperson of the Palm Beach County Canvassing Board and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you. Essentially, you ask:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation" that could affect the outcome of an election within the meaning of section 102.166(5), Florida Statutes, thereby enabling the canvassing board to manually recount ballots for the entire county.

2. May a county canvassing board do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the votes for the candidates of the presidential election?

With regard to your first question, section 102.166(5), Florida Statutes, provides that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

With regard to your second question, the answer is yes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results of the presidential election.

SUMMARY

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual re-

count of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results for the presidential election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

STATEMENT OF KATHERINE HARRIS, SECRETARY OF STATE OF FLORIDA

For Immediate Release **November 13, 2000**

I am issuing this statement to ensure there are no misunderstandings with respect to the statutory schedule for completing the presidential election in Florida. To that end, I met this morning with representatives of the campaigns of Vice President Al Gore and Governor George Bush, and I communicated by facsimile transmission with the Supervisors of Elections in each of Florida's 67 counties.

The electoral process is a balance between the desire of each individual voter to have his or her intended vote recorded and the right of the public to a clear, final result within a reasonable time. It is the duty of the Florida legislature to strike that balance, and it has done so. In order to serve the interests of individual voters and the candidates who seek elective office, the law provides for automatic recounts in extremely close elections, methods for protesting elections, and procedures for petitioning for, and conducting, manual recounts. And in order to effectuate the public's right to clarity and finality, the law unambiguously states when the process of counting and recounting the votes cast on election day must end.

For this election, that time is 5 PM, November 14, which is tomorrow.

Section 102.112, Florida Statutes, provides that the county canvassing board must certify the county returns by 5 PM on the 7th day following the general election. The performance of this duty is mandatory; there are no exceptions provided in the law. In fact, a $200 a day

personal fine is imposed on members of the county canvassing board for failing to meet this deadline.

In this context, I am very aware that a few counties are conducting or contemplating additional recounts in the presidential election. In order to assist them in continuing their recounts as long as the law allows, I am dispatching personnel from my office to the offices of the Supervisors of Elections in every county that does not have a certified return on file in my office at the close of business today. They will remain in the offices of those Supervisors of Elections until 5 PM tomorrow in order to be available to officially receive the certified returns of that county until the last moment, thus providing the maximum possible time for recounting and certification.

As previously stated, it is the duty of the county canvassing board – and the county canvassing board alone – to certify the returns from that county by 5 PM tomorrow. If the certification is not in the possession of the Florida Department of State at that time, the law provides that the votes cast in that county will not be counted in the certification of the statewide results.

Again, Section 102.112, Florida Statutes, which deals with the duties of the county canvassing board, provides, "If the returns are not received by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Section 102.111, Florida Statutes, is explicitly mandatory. It provides, "If the county returns are not received by the department by 5 PM on the 7th day following an election, all missing counties shall be ignored, and the results on file shall be certified."

Florida law does not provide any date for return certifications other than tomorrow at 5 PM, and it does not provide any penalties for noncompliance other than the fines mentioned above and the disallowance of the entire uncertified vote of the defaulting county. Any discretion vested in me by the legislature in this regard

vested in me by the legislature in this regard is necessarily limited to circumstances not specifically contemplated by the legislature in the law. Such unforeseen circumstances might include a natural disaster such as Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections; the law provides for automatic recounts, protests, and manual recounts—and it plainly states when this process must end. Therefore, I will adhere to the date and penalties that are provided for Florida law.

With regard to the status of overseas absentee ballots, they must have been executed as of last Tuesday. They must bear a foreign postmark as provide [*sic*] in Section 101.62(7), and they must be received by the Supervisors of Elections by midnight Friday. They are not required, however, to be postmarked on or prior to last Tuesday.

I will today ask the Supervisors of Elections to make plans with their canvassing boards to count and certify the relatively few remaining overseas ballots Friday night, or by no later than Saturday morning. I will further ask them to transmit facsimile copies of those certifications to my office by noon Saturday as permitted by applicable case law. I anticipate that the state Elections Canvassing Commission, composed of the Secretary of State, the Commissioner of Agriculture, and the Director of the Division of Elections, will officially certify the results of the presidential election in Florida on Saturday afternoon.

In summary, every county must have official certifications of the voting returns from last Tuesday delivered to the Florida Department of State by 5 PM tomorrow, or those returns will not be included in the statewide canvass. It is my expectation that overseas absentees will be counted and certified by each county canvassing board no later than Saturday morning. Therefore, I an-

ticipate that the presidential election in Florida will be officially certified by Saturday afternoon, barring judicial intervention.

No county canvassing board has ever disenfranchised all the voters of its county by failing to do their legal duty to certify returns by the date specified in the law. I am confident that no county canvassing board will do so in this election.

Contact: Ben McKay. 850-414-5502

County Court
Palm Beach County Florida

Chambers of
Charles E. Burton
County Court Judge

County Courthouse
West Palm Beach, Florida 33401
Phone

November 13, 2000

Honorable Robert A. Butterworth
Attorney General
400 Monroe Street
Tallahassee, Florida 32399

RE: Request for Attorney General Opinion

Dear General Butterworth:

I have been authorized by the Palm Beach County Canvassing Board to request an opinion from your office on the following issues:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system/software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

A memorandum of law follows.

MEMORANDUM OF LAW

Question 1.

Section 102.166(5) provides:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

See also, Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (stating "the statutes clearly leave the decision to conduct a manual recount within the discretion of the board.")

The Palm Beach County Canvassing Board has voted to conduct a manual recount of the votes for the presidential election based on Section 102.166(5), Florida Statutes.

Question 2.

Section 102.151, Florida Statutes does not indicate whether a county canvassing board may certify the votes for less than all of the elections held on the November 7, 2000. The Palm Beach County Canvassing Board would like to exclude the votes for the presidential election based on an ongoing manual recount of the ballots for that election.

Respectfully submitted,

/s/
Judge Charles Burton
Chairperson, Palm Beach County Canvassing Board

cc: Denise Dytrych, Palm Beach County Attorney
Katherine Harris, Secretary of State

COUNTY COURT
PALM BEACH COUNTY FLORIDA

November 12, 2000

Clay Roberts, Director
Division of Elections
1801, The Capitol
Tallahassee, FL 32399

Dear Mr. Roberts:

Pursuant to F.A.C. 1S-2.010, I am writing to you as Chairperson of the Palm Beach County Canvassing Board to seek an advisory opinion on certain actions contemplated by the board.

By way of history, the machine vote counters were tested on November 3, 2000, before and after the election on November 7, 2000; before and after the recount on November 8, 2000, and before and after the recount on November 12, 2000. Each time the test revealed no errors. In addition, the board also conducted a manual recount of one percent of the vote. As to each tally of votes, different vote totals were obtained. On November 12, 2000, the board voted to have a county wide manual recount of all ballots cast in the Presidential election.

Because the board voted to have a county wide manual recount of all ballots cast in the Presidential election, and while this manual recount will take place as expeditiously as possible, the manual recount cannot be completed by 5:00 p.m. of the seventh day following the election. Therefore, what effect can the provisions of F.S. 102.11(1), which states that if the county returns are not timely received they "shall be ignored", when read in conjunction with F.S. 102.112(1), which states that the county returns "may be ignored", have on the votes cast in the Presidential election by the citizens of Palm Beach County? Further, if the Department of State or

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or the Elections Canvassing Commission has the discretion to extend the filing deadline for certified returns, what factors would it consider in making its decision?

In addition, may the board certify all other election results to the Department of State while the manual recount continues for the Presidential election?

Due to the fact that the board is meeting on November 13, 2000 at 10:00 a.m., a prompt response would be appreciated.

Very truly yours,

/s/
Charles E. Burton
County Court Judge
Chairperson, P.B. County Canvassing Board

Florida Department of State – Division of Elections

Voter Turnout, November 7, 2000

** UNOFFICIAL RESULTS **

County	Registered Voters	Turnout	Percent	Presidential Votes	No Votes	Percent No Votes
			• • •			
Broward	887,764	588,007	66.2%	573,396	14,611	2.48%
			• • •			
Collier	123,572	95,325	77.1%	92,141	3.184	3.34%
			• • •			
Miami-Dade	896,912	654,044	72.9%	625,443	28,601	4.37%
			• • •			
Palm Beach	656,694	462,588	70.4%	433,186	29,402	6.36%
			• • •			
Volusia	260,572	184,153	70.7%	183,653	500	0.27%
			• • •			
Totals	8,752,717	6,138,770	70.1%	5,958,643	180,127	2.93%